

No. 13975

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAM DOCK LUNG, as Guardian *Ad Litem* for TAM
CHUNG FAY and TAM FAY HING, and TAM CHUNG
FAY and TAM FAY HING,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLANTS.

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PAUL P. O'BRIEN
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WILLIAM E. CORNELL,
458 South Spring Street,
Los Angeles, California,
Attorney for Appellants.



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Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLANTS.

Jurisdictional Statement.

The plaintiffs-appellants filed in the United States States District Court for the Southern District of California, Central Division, a petition seeking a declaratory judgment of United States citizenship. Such action was commenced in accordance with the provisions of Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U. S. C. A. 903).

The District Court denied plaintiffs' petition for a declaratory judgment [Tr. 15] and the plaintiffs appealed. [Tr. 17.] Jurisdiction of this Court to review the District Court's decision is conferred by 28 U. S. C. A. 1291 and 1292.

Statutes Involved.

Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903, 54 Stat. 1171), provides in so far as is pertinent, as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States.”

This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1101, *et seq.*)

which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending when the new Act became effective. (66 Stat. 280.)

The claim of right of the plaintiffs Tam Chung Fay and Tam Fay Hing within the meaning of the above section, and the denial of that right by the American Consulate General at Hong Kong, an official executive of the Department of State of which appellee is the head, and the allegation that this denies plaintiffs, and each of them, a right or privilege as a national of the United States, and other pertinent ultimate facts are pleaded in the complaint. [Tr. 3-8.]

Statement of the Case.

The action in this case was brought in the Court below under Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903) for the purpose of establishing the United States citizenship claim of both appellants herein. Each appellant claims to be a lawful blood child of Tam Dock Lung. The defendant-appellee admits that the said Tam Dock Lung, during all phases pertinent to the within action, was admitted to the United States as the son of a native of the United States. [Tr. 25.]

At the trial below it was stipulated that Tam Dock Lung (appellants' alleged father) first came to the United States in 1909, and that he made three trips thereafter to China. The first trip, he left the United States in 1914 and returned in 1915. The second trip, he left in

1924 from San Francisco and returned in 1927. The third trip, he left in October 11, 1930, and returned October 30, 1933. [Tr. 25-26.]

Tam Dock Lung (the alleged father of appellants) caused to be filed with the American Consulate General at Hong Kong, China, on or about the 13th day of June 1951, an application for the issuance of a United States passport or travel document in behalf of each of the appellants herein. That said applications were denied by the American Consulate General at Hong Kong, and following such denial to proceed to the United States, this suit was brought in the Court below. Appellants were then permitted to come forward to the United States, as provided in Section 503 of the Nationality Act of 1940, *supra*, for the sole purpose of prosecuting this suit.

In the course of the trial below it was stipulated that the eldest son of Tam Dock Lung, namely, Tam Hin Sik died in Shanghai in January, 1932, and counsel further stipulated that the second son, Tam Hin Soon, was theretofore admitted to the United States as the son of Tam Dock Lung. [Tr. 26-27.]

At the trial in the Court below both appellants, Tam Dock Lung and the second son, Tam Hin Soon, testified as witnesses for appellants. The appellee offered no evidence. At the conclusion of the testimony of plaintiffs and their witnesses and without any witnesses testifying for the defendant-appellee, the Court rendered a decision in favor of defendant-appellee. It was from this judgment that appellants appeal.

Statement of Points.

I.

The trial court erred in excluding Tam Chung Fay and Tam Fay Hing, the real parties in interest and the plaintiffs, from the court room during the entire trial and proceedings, except when they were witnesses.

II.

The trial court erred in considering alleged inconsistencies with reference to the fifth child of Tam Dock Lung, as he was not a party plaintiff or petitioner herein.

III.

The Court erred in not declaring the plaintiffs, Tam Chung Fay and Tam Fay Hing, as citizens of the United States, in view of the lack and failure of any evidence to the contrary adduced or introduced by the defendant.

ARGUMENT.

I.

The Trial Court in Excluding Both Plaintiffs Except When Testifying as Witnesses Committed Prejudicial Error.

At the commencement of the trial in the lower court both plaintiffs, Tam Chung Fay and Tam Fay Hing, were excluded by the Court. [Tr. 21-22.]

These plaintiffs were the real parties in interest (Rule 17(a), Federal Rules of Civil Procedure) and indispensable parties to the pleadings, and as a consequence should have been permitted to be present during all stages of the proceedings before the Court.

Rule 19(a) of the Federal Rules of Civil Procedure requires that persons having an interest in litigation shall be joined as parties to the action. Volume 2 of *Federal Practice and Procedure*, Section 512 at pages 58-62, in discussing Rule 19(a) states:

“Indispensable parties are those who have such an interest in the subject matter that a final decree cannot be made without either affecting their interest or leaving the controversy in such condition that a final determination may be wholly inconsistent with equity and good conscience. The test of indispensability therefore is whether the absent person’s interest in the controversy is such that no final judgment or decree can be entered which will do justice between the parties actually before the court, without injuriously affecting the rights of others not brought into the action.”

There are many cases cited by the authors in which this rule is discussed and analyzed. It is respectfully submitted that as plaintiffs in this action were seeking permanent entry into the United States as the sons of Tam

Dock Lung, namely, to have the rights and privileges as citizens of the United States, these plaintiffs were “indispensable parties” within the meaning of Rule 19(a) and as a consequence had to be included in the pleadings, and certainly a “final decree” could not be made without affecting their interests. As indispensable parties they were certainly the *real parties in interest*.

As indispensable parties they therefore should have been present during all stages of the proceedings in the Court below. The case of *Baltimore & O. R. Co. v. Chicago River & I. R. Co.*, 170 F. 2d 654, cert. den., 69 S. Ct. 811, 336 U. S. 944, 93 L. Ed. 1101, in discussing indispensable parties held that an “indispensable party” is one whose interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that his legal presence as a party to the proceeding is an absolute necessity *without which the Court cannot proceed*. The right of a party to be present at the trial is also discussed in Volume 53, *American Jurisprudence*, Section 24, page 42, Wherein it is stated:

“A party to a civil action who is not in default is entitled to be present in the court room, and to be represented by counsel at all stages during the actual trial of the action.”

Citing *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, 39 S. Ct. 435; *Willingham v. Willingham*, 192 Ga. 405, 15 S. E. 2d 514; and *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430. Volume 53, *American Jurisprudence*, further discusses the right of the plaintiff to be present in Section 34 at page 49, where they state, in part, as follows:

“The trial of causes, *whether civil or criminal*, must be so conducted as to give the party litigants in civil actions or the accused in a criminal prosecution

opportunity to be present and to be heard at every stage of the proceedings, . . .” (Emphasis ours.)

Other cases which hold that parties should be present during the trial of an action are: *Freimann v. Gaudmeier*, 63 N. E. 2d 150, 116 Ind. App. 170; *Ulmer v. Mackey*, 242 S. W. 2d 679. The case of *Leonard's of Plainfield v. Dyvos*, 31 A. 2d 496, 130 N. J. L. 135, holds that the right of party to be present is basic to “due process of law.”

In applying these rules and the law as above indicated to the particular plaintiffs in this matter, their right to be present appears to be extremely significant in that they could not speak English and an interpreter was required for their testimony. [Tr. 22.] As they could not speak English they, of course, had no conception of the conversation between counsel and the Court when the Court excluded them from the trial. Therefore, of course, they had no opportunity to object or to state their feelings in the matter. As theirs was an action seeking the precious privilege of citizenship and as they could not converse in the English language, it is respectfully submitted the trial court should have exercised extreme care and caution toward them and given them an opportunity to choose whether they desired to be excluded, and the Court should have actually insisted that plaintiffs be present during all stages of the trial.

Thus, as the actual plaintiffs were real parties in interest, and indispensable parties within the meaning of Sections 17(a) and 19(a), Federal Rules of Civil Procedure, and as their language disability was readily apparent, it is submitted that the Court committed prejudicial error in excluding plaintiffs from the court room except when testifying as witnesses.

II.

The Trial Court Should Not Have Considered Alleged Inconsistencies Relative to the Fifth Son of Tam Dock Lung, Namely, Tam Jing Hing, as He was Not a Party nor a Witness Before the Trial Court.

The trial court in its findings of fact stated as follows:

“V.

The evidence adduced by each of said plaintiffs and their witnesses, Tam Dock Lung, alleged father; and Tam Hin Soon, alleged brother, contains so many discrepancies relating to subjects about which each and all of said persons and [16] witnesses should be in agreement, and the credibility of the testimony of each of said plaintiffs and of each of said witnesses has been so impeached that the Court does not believe the testimony of each of said plaintiffs or said witnesses and there is no credible evidence to support plaintiffs' claims that they are United States citizens.” [Tr. 13.]

It is respectfully submitted that the trial court, with reference to the inconsistencies stated in paragraph V of the findings of fact, had in mind the testimony and alleged inconsistencies concerning the birth of the fifth child of Tam Dock Lung. [Tr. 71-73.] The reference to this fifth child appears to be purely a collateral matter and it is, of course, a well settled rule that a witness cannot be impeached on a collateral issue or matter. It was apparently admitted by all counsel that this fifth child was in no way involved in the matter either as a party or a witness and specifically was not one of the plaintiffs.

It is, therefore contended by appellants that the Court committed error in any way considering the alleged inconsistencies concerning the manner or type of birth of the fifth child with reference to the credibility of veracity of plaintiffs or their witnesses.

III.

The Court Should Have Declared Plaintiffs as Citizens of the United States as No Contrary Evidence or Testimony Was Presented by the Defendant-Appellee.

As heretofore set forth, it was stipulated in the trial below that the plaintiff, Tam Dock Lung, was admitted to the United States as the son of a native. [Tr. 25.]

Tam Dock Lung testified that he married Fung Shee March 1, 1908, in China. [Tr. 29-30.] This ceremony was recognized as a legal marriage in China. [Tr. 31-32.] Tam Dock Lung further testified that his first child was born February 5, 1909, in China. [Tr. 34.] To verify his wife and family, Tam Dock Lung identified a photograph, Plaintiffs' Exhibit 6. From this picture he identified his wife, his daughter, Mow Don, his alleged son Tam Chung Fay, a plaintiff in this action, and Tam Fay Hing, as a son, and the other plaintiff to this action. [Tr. 28-29.] Tam Dock Lung further testified that the second son was born October 11, 1915, and was named Tam Hin Soon. He further testified that when he returned to China in 1924 his second son was approximately ten years old and attending school [Tr. 39], and that he remained in China on this trip for approximately three years. [Tr. 39.] He testified that two children were born, the third child being named Tam Chung Fay, born October 4, 1925, and Tam Fay Hing, born March 5,

1927. These two are, of course, the plaintiffs in this action. [Tr. 40.] He further stated these two children were born to himself and his wife Fung Shee. [Tr. 40.] He further testified that when he left China for the United States in 1927, his wife and the plaintiffs herein were living in the same house in the same village [Tr. 42] and that when he again returned to China from the United States October 11, 1930, he returned to the same village that he had left and found his wife and children still residing in the same abode, and specifically identified the plaintiffs herein. [Tr. 43-44.] He further testified that when plaintiffs herein arrived in the United States he recognized them as his sons that he had seen in China. [Tr. 46.] He identified his son Tam Hin Soon [Tr. 48], and he identified the plaintiffs in this action, his third and fourth sons, as his sons, during the course of the trial. [Tr. 50.]

Counsel at the time of trial stipulated that the State Department denied the applications of plaintiffs herein for passports as American citizens on the ground that they were not American citizens. [Tr. 49.]

Tam Hin Soon who has been previously identified by Tam Dock Lung as his son, and by stipulation it had been agreed was admitted to the United States as the son of Tam Dock Lung, testified on behalf of plaintiffs herein. He testified that he lived in the same village as his father and that his mother's name was Fung Shee, and that he first saw his father when he was about ten years old. [Tr. 67.] He testified that while he was living with his mother and father two children were born to his mother, namely, Tam Chung Fay and Tam Fay Hing, plaintiffs herein. [Tr. 69.] This witness also

identified the family group in the photograph, being Plaintiffs' Exhibit 6. He specifically identified his mother and both plaintiffs herein. [Tr. 77.] He also specifically identified the plaintiffs herein, when they were admitted to the court room from the exclusion room for the purpose of identification, as his brothers and the sons of Tam Dock Lung. [Tr. 78.]

Plaintiff Tam Chung Fay testified that he was born in the same village as his brother, Tam Hin Soon, and his brother, the other plaintiff herein. [Tr. 80.] He testified that he recognized his mother and brother, the other plaintiff herein, from the photograph, Plaintiffs' Exhibit 6. [Tr. 83.] He identified his brother Tam Fay Hing, the other plaintiff herein, as his brother who was present in Court and walked in and out of the doorway with him from the exclusion room. [Tr. 91.]

The other plaintiff, Tam Fay Hing, testified that he was living at the village in China with his mother and his first, second and third brother and his younger sister, and that he recalls his father living with him in China. [Tr. 92.] This witness also identified his brother and mother from the photograph, being Plaintiffs' Exhibit 6. [Tr. 93.]

Thus, from the testimony of Tam Dock Lung, the alleged father, and his son, Tam Hin Soon (admittedly the son of Tam Dock Lung) and the plaintiffs themselves, it was clearly established that plaintiffs were the lawful blood children of Tam Dock Lung and that a legal marriage ceremony had taken place in China between himself and Fung Shee. No evidence or testimony in contradiction of this proposition was introduced by the defendant-appellee.

With reference to the alleged discrepancy from the finding of the Court [Tr. 13] it should be pointed out that although plaintiffs have the burden of proof in a suit for a judgment declaring themselves nationals of the United States, this type of burden does not raise a presumption that the plaintiffs or their witnesses will commit perjury. (*Lee Mon Hong v. McGranery* (1953), 110 Fed. Supp. 682.) As has heretofore been pointed out, the testimony of the plaintiffs and their witnesses was entirely uncontradicted and unimpeached and the defendant-appellee offered no evidence. It is submitted that unimpeached and uncontradicted testimony cannot be disregarded.

Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 216-217, 51 S. Ct. 453, 75 L. Ed. 983, 987-988;

Grace Bros. v. Commissioner of Internal Revenue (C. A. 9), 173 F. 2d 170, 174;

San Francisco Assn. for the Blind v. Industrial Aid for the Blind, Inc. (C. A. 8), 152 F. 2d 532, 536.

In *Foran et al. v. Commissioner of Internal Revenue* (C. A. 5), 165 F. 2d 1705, wherein the only evidence before the trial court was the testimony of one of the parties the Appellate Court said:

“We think the court’s refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury.”

A reading of the entire testimony of plaintiffs and their witnesses leaves not the slightest room for doubt that their relationship was fully established and that the appellants are citizens of the United States.

In *Johnson v. Damon* (C. C. A.), 16 F. 2d 65, the Court considered alleged discrepancies on which an excluding decision was based, and in reference to the excluding decisions said:

“The mind revolts against such methods of dealing with vital human rights.”

This language might well be applied in the instant case.

In the case of *Gung You v. Nagle*, 34 F. 2d 848, 852, the Court stated:

“Relationship is not usually proved by physical facts, and never is where the mother does not testify, but by pedigree reputation in the family, and by the conduct by the party, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligations involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parents and child is evidence to the contrary, and further:

“Such evidence is not collateral evidence; it is direct and material evidence on the issue.”

The testimony of the plaintiffs, their alleged father and brother clearly established a relationship of parent and child, and they all lived together in the same home and the same village. No evidence was introduced to the contrary. Thus such testimony should have been considered by the trial court as “direct and material evidence on the issue.”

See also:

Quan Toon Jung v. Bonham (C. A. 9), 119 F. 2d 915;

Wong Tsick Wye et al. v. Nagle (C. A. 9), 33 F. 2d 226.

The positive, uncontradicted and unimpeached testimony given by the plaintiffs was supported by their alleged father and brother, both of whom the defendant and appellee admits are properly in the United States. Their testimony was further corroborated by the fact that the immigration records over a period of many years show the genealogy and citizenship of the putative father by records of his trips from the United States to China and back, and further show that the brother was heretofore admitted as the citizen son of Tam Dock Lung, all of this is buttressed by a family photograph taken in China showing the plaintiffs with their alleged mother.

Conclusion.

It is respectfully submitted that the trial court committed error in excluding the plaintiffs, being the persons attempting to establish citizenship, from the trial of the matter in the lower court, and that plaintiffs established by clear and convincing evidence and testimony their relationship to Tam Dock Lung sufficient to be declared as citizens or nationals of the United States, and that as a consequence the judgment of the lower court should be reversed and appellants each declared United States citizens and/or nationals.

Dated, Los Angeles, California, December 30, 1953.

WILLIAM E. CORNELL,

Attorney for Appellants.

